

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**HECTOR JIMENEZ**  
Claimant

**APPEAL NO. 15A-UI-02066-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FERRARA CANDY COMPANY**  
Employer

**OC: 01/18/15**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Hector Jimenez (claimant) appealed a representative's February 5, 2015, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Ferrara Candy Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 17, 2015. The claimant participated personally. The employer participated through documents. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 26, 2009, as a full-time packaging machine operator. The claimant signed for receipt of the employer's handbook on August 17, 2009, and November 3, 2014. The handbook indicates an employee will accumulate attendance points for absences and an employee who accumulates eight attendance points in twelve months will be terminated. The claimant was supposed to be at work at 7:00 a.m. and could arrive as late as 7:07 a.m.

The employer issued the claimant an occurrence report on January 22, 2014, after receiving 0.5 points for being tardy. On August 11, 2014, the employer issued the claimant an occurrence report on August 11, 2014, for an absence on July 23, 2014. The employer assessed the claimant one attendance point. On December 18, 2014, the employer issued the claimant an occurrence report for absences on December 15, 16, and 17, 2014. The claimant had influenza and properly reported his absences. The employer assessed the claimant three attendance points.

On January 16, 2015, the claimant arrived at work at 7:07 a.m. On January 19, 2015, the employer terminated the claimant on January 19, 2015, for accumulating eight attendance points.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. In this case the employer did not provide sufficient evidence of job-related misconduct. The evidence provided by the employer showed the claimant had accumulated five attendance points at the time of his termination. The absence on January 17, 2014, had fallen off the claimant's record. He was left with one point for July 23, 2014, three points for illness in December 2014, and one point for the final incident. The claimant arrived at the last moment allowed and was technically not tardy for work. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's February 5, 2015, decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs